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No. 93-1072

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

DAVID CHARLES DeLONG, *et. al.*,

Petitioners,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et. al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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I. WIRTZ IS APPLICABLE: The key distinction Respondents raise to distinguish *Wirtz v. Hotel, Motel and Club Employees Union,* 391 U.S. 492 (1968) is that any "taint" on the vote taken on the collective bargaining agreement at issue was created, by actions towards "members of only one Local Union, out of a total of 24 Local Unions." (Brief in Opposition, page 8). Plaintiffs sought to present trial testimony of Donald Joseph Clift, and his brother, both members of Local 98, UAW, in Indianapolis, Indiana, regarding facts constituting basis for their class action suit initiated on behalf of Local 98 members because of similar LMRDA violations denying meaningful vote at that local on the identical collective bargaining agreement at issue in this case. Their LMRDA denial of meaningful right to vote claim was before this court

on a pending certiorari petition in 1987 (No. 87-42) when this Court decided *Reed v. United Transp. Union,* 488 U.S. 319 (1989), as noted in footnote 3 therein.

Counsel of Record for Respondents at that time vigorously and successfully opposed presentation of Clifts' testimony relying upon Fed. R. of Evid. 403, arguing that the relevance was outweighed by possible prejudicial effect, because the jury might be confused by essentially hearing allegations of two separate lawsuits. Plaintiff's contention was that this testimony was necessary to prove that there was a concerted national effort by the UAW to deny LMRDA meaningful vote rights of all of the more than 19,000 laid-offs, then constituting over half the members of UAW through-out the Navistar nationwide chain. Thus contrary to Respondent's assertions, Plaintiffs were

held *not* "entitled to prove the facts showing a broader effect to the jury." (Id. at page 8). Plaintiffs were therefore obliged to proffer this testimony.

Petitioners do agree with Respondents that "it is entirely appropriate to apply the more traditional notions of proximate causation... " (Opposition Brief page 7) for purposes of LMRDA law, but disagree that the area of law to be followed should be fair representation. This Court noted in *Wirtz* that "Congress' model of democratic elections was political elections in this country..." for the LMRDA. (*Wirtz, supra,* at 391 U.S. 504) The Petition on pages 18-19 demonstrates burden shifting in the context of public elections is the norm. In light of the fundamental nature of voting rights, it would be inconsistent for this Court to adopt state limitation of action periods

for LMRDA cases as in *Reed*, (where it refused to apply fair representation cases) and yet apply fair representation caselaw to proximate cause when LMRDA, election law generally, and other labor law affecting fundamental rights like speech (see pages 19-22 of Petition), burden shifting of proximate causation is the "traditional notion.

II. THIS WAS A NATIONAL VIOLATION: Respondents persist in claiming the Local 402 Springfield voters were "mathematically incapable of altering" the national outcome (*Id* at page 8). Yet Respondents' own numbers admit that the national vote ratifying the contract was "7,086 to 3,949", (which included the Local 402 vote) and Local 402's vote was "948 in favor and 842 opposed." (*Id* at page 2) Backing the Local 402 vote out of the national vote, the contract passed at

other locals (including the tainted Local 98) by a vote of 6138 to 3107. The Plaintiff class undisputed to be 4540 people, could have affected the outcome. A massive negative vote at Local 402 was entirely *likely*, as Local 402, *like Local 98* according to Clifts, had a Local Supplement on Seniority that Plaintiffs demonstrated to the jury prevented alteration by a national vote on seniority issues. This proposed addition to the proximate cause jury instruction was intended to cause the jury the assess the impact of violation of the Local 402 Supplement on Seniority as to voter behavior. The very essence of Petitioners LMRDA Claim and thereby the purpose of the proposed addition to the proximate cause jury instruction was that Local 402's Local Supplement on Seniority was its "Bible" on seniority that should not be

modified by a national vote without knowing consent by meaningful vote of Local 402 members, and that had these 4540 members become aware the Local Seniority Supplement was at risk, a massive turn-out to vote against the national contract would have proximately resulted.

The false light Respondent seeks to create that this proven denial of meaningful vote right was a local phenomenon becomes transparent considering Respondents' false claim that the *proven* "taint" in the vote process "is limited to those voters who voted in Springfield and that the voters at other locations were not affected by the alleged improprieties which occurred in Springfield...." (Id at page 8). The key to understanding this misrepresentation is again the Clift brothers at Local 98 in Indianapolis. The *Clift v. UAW* certiorari petition was one

case of many in conflict as to whether to apply fair representation statute of limitation caselaw to LMRDA claims. The Clift file in the Clerk's Office provides a full understanding, but in that Petition, Clifts claimed:

> On May 2, 1982, a special meeting was called to ratify the supplements negotiated between the respondents. No notice of the meeting was provided to approximately Three Hundred Fifty (350) employee/members who were on layoff from Harvester at that time. Furthermore, all employee/members who had been on layoff for more than six (6) months, and many employee/members who had been on layoff for less than six (6) months, were, by Union Executive Order, <u>specifically</u> denied the right to vote at the meeting.

There were a total of 614 Local 98 members denied a meaningful vote, totalled 614, and that number may be factored in the above national count as the Clifts stated in their Petition:

> "Master Recall" was ratified by a vote of Two Hundred Thirty-five (235) for and One Hundred Twenty-nine (129) against. Clearly, the votes of the

> Three Hundred Fifty (350) employee/members who were denied the right to vote and who were adversely affected by any changes in "Master Agreement", pertaining to layoff and recall seniority rights, would have had a substantial impact on the outcome of the ratification vote.

As Respondents are well aware, the *Clift* LMRDA claim case is still pending for trial. Accepting this petition would assist the Seventh Circuit in dealing with the issue of proximate causation. Petitioners herein have cited and quoted the Court's opinion in *Reea* extensively in their Petition for Writ of Certiorari as authority for the proposition that fair representation caselaw has little or no bearing on LMRDA caselaw. Yet Respondents still persist in arguing fair representation caselaw and not LMRDA caselaw should apply. Respondents convinced the trial court and Sixth Circuit on this erroneous legal position.

(Brief in Opposition on page 5). Indeed, Respondents claim they could uncover no cases addressing the causation issue in the context of Title I challenges to union ratification votes when in fact, Petitioners have cited numerous such cases on pages 24-32 of the Petition, the key case being *Bauman v. Presser,* 117 LRRM 2393 (D.D.C. 1984) which oddly neither the trial court, the Sixth Circuit, nor Respondents have *ever* mentioned.

III. ANY WAIVER IS EXCUSABLE: But assuming this want of authority to be the case, *Reed* still requires that LMRDA be viewed as a distinct area of statutory law necessitating analysis quite separate and different from fair representation cases. Continuing with the claimed assumption there is no LMRDA precedent on causation, Petitioners' argument that *City of Newport v. Fact Concerts Inc,* 453 U.S. 247 (1981)

should apply excusing any claimed waiver under Fed. R. of Civ. Pro. 51 becomes even stronger, as this case clearly presents to the Court an issue like that in *Newport* that is "novel, important and likely to recur" (see analysis on pages 49-52 of Petition).

Respondents leap to the conclusion that Fed. R. Civ. Pro. 51 requiring objection "is subject to a narrow exception", i.e. "plain error". (Brief in Opposition at page 5). Yet the Sixth Circuit failed to properly apply the "plain error" doctrine by wrongly concluding *Newport* prevents applying that doctrine if law is evolving, when in fact *Newport* created an entirely different and broader exception to requiring objection where the issue is "novel, important and likely to recur".

Citing *Newport*, the First Circuit

has held that the federal courts "had recently been advised not to limit ourselves to plain error rulings in cases of improper district court practices of broad consequence, *but to exercise our supervisory powers...*" *U.S. v. Martinez-Torres*, 912 F.2d 1552 at 1554 (1st Cir. 1990) (Emphasis supplied). The Second Circuit has held an appellate court may also consider whether an instruction was proper despite no objection if the issue is a "novel" issue of law, and that thereby the reviewing Court is not restricted to the plain error standard. *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103 (2nd Cir. 1988), *cert. denied*, 109 S.Ct. 1642 (1989). Yet the Sixth Circuit did not address this point at all, and actually turned *Newport* on its head by using it as a constraint to the "plain error" doctrine when *Newport*

actually carves out an *exception* to the strict application of the plain error doctrine. *Earl v. Bouchard Transp. Co., Inc.*, 917 F.2d 1320 at 1324 (2d Cir. 1990) at 1324. The Sixth Circuit reversed the very intent of the Supreme Court's holding in *Newport* that the federal courts were not limited to the "plain error" doctrine to excuse waiver, and wrongly used *Newport* to restrictively confine any excuse to the use of the plain error doctrine, and then bar the use of that doctrine if the law is "uncertain" or evolving.

In *St Louis v. Praprotnick*, 485 U.S. 112 (1988) (plurality opinion), *Newport* was relied upon to permit review despite lack of objection to define the proper legal standard for determining when isolated decisions by municipal employees may expose the municipality itself to liability under 42 U.S.C. Section 1983.

This Court emphasized that the lower court did pass on the issue, and that review would give lower courts and litigants a fairer chance to craft jury instructions that will not require scrutiny on appellate review. The trial court did pass on the proximate cause issue in this case.

The reference by the Sixth Circuit, (page A14-15 of Appendix) to discussion between the trial court and Plaintiffs' counsel regarding the interrogatories to the jury, neglects the overall approach of the trial court. The Sixth Circuit did recognize (page A-13 of Appendix) that Plaintiffs had indeed sought to have additions made to the proximate cause instruction presented at the end of the trial, which as noted above related to impact on the national vote. Despite Plaintiffs' argument that the discussion regarding proposed additions to the charge

clearly evidenced in context an objection to this instruction, the Sixth Circuit wrongly *interpreted* the transcript to be that Plaintiffs merely sought to add surplus language to the charge. When the interrogatories were submitted to the jury at the close of the jury charge there was also this exchange (508 of the Joint Appendix filed with the Sixth Circuit):

> THE COURT: Fellas, I'm assuming at this time that you are renewing all objections previously made to the charge that were overruled during the charge conference. I'm assuming that *you are renewing all requests to instruct that were overruled.*
> Now, what I have done is *I have just incorporated the charge conference into the appropriate portion of the trial* once the instructions have been given.
> *In addition to that,* are there any objections to the charge, suggested, or deletions, Mr. Pennington? (Emphasis supplied)

Petitioners claim the lengthy aforementioned arguments regarding suggested additional jury instruction

language about the Local Supplement on Seniority and its effect on voter behavior and thereby proximate causation were "renewed" by the court in this statement and further applied to the interrogatories by "incorporation" due to the guarantee of the trial judge that those objections and suggested additions were "incorporated ... into the *appropriate portion* of the trial (i.e. the interrogatories). The court clearly was referring to the interrogatories as it distinguishes the jury *instructions*.

To expect weary trial counsel to formulate an elaborate specific objection precisely raising a novel issue of law at the close of a three week trial in which only liability was to be tried (and thus only liability thoroughly researched) pursuant to an oral bifurcation order of the trial judge on the telephone shortly

before trial, with no further directions, written or oral, regarding proximate causation in the context of bifurcation, demonstrates "interests in effective trial administration advanced by Rule 51" would not be served (*Newport, supra* at 453 U.S. page 256) and bifurcation "seriously affected the fairness, integrity or public reputation of a judicial proceeding" (*Newport, supra*, 453 U.S. at 254). It also violated the obligation of the trial court to recognize when bifurcating issues that "whatever the specific subject matter, however, it appears to be a *sine qua non* of bifurcation that the various phases or trial segments be sharply defined and that the definition be well understood by the parties and by the Court." *United States v. Am. Tel. & Tel. Co.*, 83 F.R.D. 323 at 335 (D.D.C. 1979).

This Court should ask, as it did in

Newport, how would the "interests in effective trial administration advanced by Rule 51...be served.." (*Newport, supra* at 453 U.S. p. 256) when Petitioners are forced to accept a Pyrrhic victory and sees a wrongdoer get away while the legal system eludes analysis of novel legal issues in a changing legal climate that rightfully should be made clear? Even the Sixth Circuit even recognized LMRDA caselaw on proximate causation as "uncertain authority" (Appendix p. A-17). Comparing the juridical significance of the proximate cause issue at hand against the issue in *Newport* and other decisions like it, the Court should discern much more is at stake here.

CONCLUSION: In the circumstances, relying upon Respondents' palpably false assertions that the violations affected only one out of 24 Local Unions, and that

the "taint" was an isolated exception rather than the rule, would risk a major disservice to this case and future litigation. Not accepting certiorari to consider formulating law regarding burden of proof allocation on such a speculative fact as voter turnout and voting behavior would risk rendering the LMRDA remedy *"practically worthless"*.

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